No. 06-694

In the Supreme Court of the United States

THE UNITED STATES OF AMERICA,
Petitioner,

v.

MICHAEL WILLIAMS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE FREE SPEECH COALITION AND FIRST AMENDMENT LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT

The Free Speech Coalition and First Amendment Lawyers Association submit this brief as *amici curiae* in support of Respondent and urge this Court to affirm the decision below by the Eleventh Circuit.[1] This brief is submitted with the consent of counsel for the Petitioner and Respondent, filed with the Court herewith.

INTEREST OF *AMICI CURIAE*

The Free Speech Coalition is a trade association that assists film makers, producers, distributors, wholesalers, retailers, and Internet providers located throughout the United States in the exercise of their First Amendment rights and in defense of those rights against censorship. Founded in 1991, the Free Speech Coalition currently represents several thousand businesses and individuals involved in the production, distribution, sale, and presentation of constitutionally-protected and non-obscene materials. The organization supports litigation against federal, state, and local incursions on free speech.

In 1997, the Free Speech Coalition initiated a constitutional challenge to the federal Child Pornography Prevention Act of 1996, asserting that the law's expanded definition of child pornography, which included material that "appear[ed] to be" or "convey[ed] the impression of" child

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae*, the Free Speech Coalition and First Amendment Lawyers Association, disclose that they authored this brief in its entirety. No person or entity, other than the Free Speech Coalition, its members, or its counsel have contributed to the costs of preparing and submitting this brief.

pornography, violated basic First Amendment principles of free speech. This complaint ultimately led to the Court's opinion in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), in which the two challenged provisions were struck down as constitutionally overbroad. The Court's decision in *Free Speech Coalition* is central to the instant constitutional challenge to 18 U.S.C. 2252A(a)(3)(B)(ii) and (ii) (Supp. IV 2004).

The First Amendment Lawyers Association ("FALA") is an Illinois-based, incorporated, not-for-profit association. Originally formed in the late 1960s, FALA now includes over 180 members. Its membership includes the most prominent First Amendment attorneys in the United States, covering virtually every state. FALA's members frequently litigate the constitutionality of statutory schemes that infringe upon the freedom of speech and artistic expression. Given the nationwide span of their experience and the focused nature of their practices, FALA attorneys are uniquely qualified to address the First Amendment harms inflicted by laws that intrude upon the freedom of expression.

The Free Speech Coalition and FALA do not advocate or tolerate the production or distribution of child pornography involving real children, and have assisted in the eradication of such materials through their organizational policies. Despite their strong opposition to child pornography, *amici* and their members and clients are nonetheless impacted by Section 2252A(a)(3)(B) because this provision prohibits large amounts of constitutionally-protected expression unrelated to actual child pornography.

Section 2252A(a)(3)(B) criminally captures the thoughts and beliefs that some individuals may have or express about constitutionally-protected materials, which do not depict, in

any way, actual children engaging in actual sexual activity. In so doing, Section 2252A(a)(3)(B) undermines the artistic, expressive, and constitutionally-protected interests of many of *amici*'s members and clients who are involved in the creation, production, and distribution of films and other art forms that address or include human sexuality. As with most forms of dramatic art, the essential mode of communication lies with the creation of a willing suspension of disbelief, a dynamic whereby viewers are transformed into believing, if only temporarily, that what is happening on the screen or within another visual medium is happening in reality. In other words, the primary artistic objective for many film makers and other creators represented by *amici* is to create a world of fantasy or "make believe."

Section 2252A(a)(3)(B) specifically targets this artistic process by placing criminal sanctions on an individual's communication of belief regarding artistic materials. Although the films and other art forms presented by *amici*'s members and clients are entirely protected forms of expression under the First Amendment, Section 2252A(a)(3)(B) disrupts and criminally sanctions constitutionally-protected communication about many of these materials. This legislative effort fundamentally dismantles the artistic process.

Accordingly, the Free Speech Coalition and FALA file this *amici* brief to protect and preserve the artistic and expressive interests of their members and clients and to ensure that the core tenets of this Court's decision in *Free Speech Coalition* are affirmed.

SUMMARY OF ARGUMENT

Section 2252A(a)(3)(B) is constitutionally overbroad because it captures vast amounts of constitutionally-protected material. The provision is not limited to simple acts of pandering, nor is it restricted to offers and solicitations of child pornography. Section 2252A(a)(3)(B) bars within interstate commerce all forms of advertising, promotion, presentation, distribution, and solicitation that reflect beliefs or cause beliefs about child pornography. In so doing, this provision snags the constitutionally-protected artistic methods used by movie producers and other dramatic creators, many of whom are seeking to create through their works a willing suspension of disbelief by viewers. Section 2252A(a)(3)(B) criminally sanctions this essential and longstanding artistic craft by prohibiting producers from conveying and causing certain beliefs about youthful sexuality.

Section 2252A(a)(3)(B) also captures large amounts of expression offered by other individuals, including movie reviewers, critics, and distributors of widely-popular and, in some cases, award-winning, films. There are countless movie reviews, critiques, and advertisements that present films as containing sexually-explicit depictions of underage characters. In some cases, these presentations describe the films as obscene. These reviews and advertisements are banned by the facial language of Section 2252A(a)(3)(B) because they knowingly present material in a manner that reflects the belief (as opposed to the reality) or causes the belief (not the reality) that the material contains actual and/or obscene child pornography.

The legislative findings supporting Section 2252A(a)(3)(B) do not narrow or otherwise limit its unconstitutional overbreadth. Congress has offered little to no connection

between the types of speech targeted by Section 2252A(a)(3)(B) and the likelihood that such prohibition will curtail the market for child pornography. In addition, the claim that prosecutors need Section 2252A(a)(3)(B) to fend off "virtual-child" defenses in child pornography cases is simply not supported by the record. Federal prosecutors have experienced extraordinary success in child pornography cases, even after the Court's decision in *Free Speech Coalition*, and do not need overly broad restrictions on speech and belief in order to be successful.

Finally, Section 2252A(a)(3)(B) is unconstitutionally vague because it fails to define the core phrases "reflects the belief" and "cause another to believe," thereby allowing law enforcement officers unfettered discretion in applying and enforcing the law.

ARGUMENT

1. SECTION 2252A(a)(3)(B) IS UNCONSTITUTIONALLY OVERBROAD.

Section 2252A(a)(3)(B)'s plain language, which bans the communication of beliefs about constitutionally-protected material is unconstitutionally overbroad because it impermissibly suppresses speech and beliefs that are protected by the First Amendment. Section 2252A(a)(3)(B) directly contravenes the fundamental principle that "[sexually-explicit] speech that is neither obscene nor the product of sexual abuse [of a real minor] retains protection of the First Amendment." *Ashcroft v. The Free Speech Coalition*, 535 U.S. 234, 251 (2002) (citing *New York v. Ferber*, 458 U.S. 747, 764-65 (1982)). It also undermines the firmly established principles that "[t]he Government may not suppress lawful speech as the means to suppress unlawful speech" and that "[p]rotected

speech does not become unprotected merely because it resembles the latter." *Id.* at 255. Moreover, Section 2252A(a)(3)(B) disregards this Court's admonition that "First Amendment freedoms are most in danger when the government seeks to control thought or justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought." *Id.* at 253. In short, under the guise of protecting children, Congress has impermissibly cast its legislative net far beyond the permissible target of child pornography and into the waters of protected speech.

A. The Plain Language of Section 2252A(a)(3)(B) Captures Far More Speech Than Just "Pandering."

Petitioner characterizes Section 2252A(a)(3)(B) as being a "pandering statute." *See* Pet. Br. 16, 17, 31, 37; *United States v. Williams*, 444 F.3d 1286, 1289, n.2 (11th Cir. 2006). But the term "pander" is nowhere found in this provision. Instead, the statute contains the more generic and unqualified terms "advertises," "promotes," "presents," "distributes," and "solicits." The common definitions of these terms and the legal parameters of the statute do not require that these five forms of expression be erotic in nature or be made in relation to an attempted sale, purchase, or other transaction.

In addressing Section 2252A(a)(3)(B), the Eleventh Circuit defined pandering as "the catering to or exploitation of the weakness of others." *Williams*, 444 F.3d at 1289 (citing Merriam Webster Online Dictionary). But the plain language of Section 2252A(a)(3)(B) does not require the expressive acts of advertising, promoting, presenting,

distributing, or soliciting to be offered in a manner that caters to or exploits the weaknesses of others. These five forms of expression, whether they are used as a method to cater or as a means of description, whether made in an effort to exploit or an attempt to inform, or whether they are directed at the weak-minded or the astute, are all banned if they "reflect the belief" or "cause another to believe" that the discussed material is or contains real or obscene child pornography.

In short, Section 2252A(a)(3)(B) makes no effort to incorporate the term pandering into its legislative lexicon. Nor does this provision exempt or otherwise protect expression that is offered for literary, artistic, scientific, or other non-commercial purposes. As a result, Section 2252A(a)(3)(B) is far broader than a pandering statute.[2]

B. Section 2252A(a)(3)(B) Bans Much More Speech Than Just "Offers" and "Solicitations."

At times, Petitioner describes Section 2252A(a)(3)(B) as simply prohibiting offers or solicitations to buy or sell child pornography. *See* Pet. Br. 15, 17, 21, 24, 28. But the plain language of the statute applies to far more forms of expression

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[2] If Congress simply sought to ban pandering under Section 2252A(a)(3)(B), it could have followed the language of 39 U.S.C. § 3008(a) and specifically used the term. Section 3008(a) provides, "Whoever for himself, or by his agents or assigns, mails or causes to be mailed any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative shall be subject to an order of the Postal Service to refrain from further mailings of such materials to designated addresses thereof." But instead Congress chose to use wording that captures expression far broader than mere pandering.

than just offers and solicitations. The reality is that the terms "advertise," "promote," and "present" are not limited to acts of bartering or commodity exchanges, but include more general and public presentations and notifications about materials.

The term "advertise" is defined as "to make something known to: notify; to make publicly and generally known; to announce publicly especially by a printed notice or broadcast." *See* Merriam Webster Online Dictionary, http://www.m-w.com (last visited July 30, 2007).[3] The word "present" is defined as "(1): to bring or introduce into the presence of someone especially of superior rank or status (2) : to introduce socially b: to bring (as a play) before the public." *Id.* And the term "promote" is defined as "to advance in station, rank, or honor: raise." *Id.*

These contemporary definitions reflect that the common usage of the terms advertise, promote, and present is not limited to commercial, transactional, or bartering settings, but includes all forms of public pronouncements or introductions regarding particular materials. In other words, these definitions bolster the Eleventh Circuit's conclusion that Section 2252A(a)(3)(B) "is not limited to commercial

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[3] This is a more contemporary dictionary than the one offered in Petitioner's brief. Petitioner offers more transactional or bartering-dependent definitions for the terms in Section 2252A(a)(3)(B), using an older dictionary (*Webster's Third New International Dictionary*, (1961)) and some isolated definitions found therein. Pet. Br. 27. Although conceding that Section 2252A(a)(3)(B) applies to non-commercial forms of advertising, promotion, presentation, distribution, and solicitation, Pet. Br. 18-24, Petitioner nonetheless seeks to limit the scope and meaning of the terms "advertise," "promote," and "present."

exploitation and continues to sweep in non-commercial speech." *Williams*, 444 F.3d at 1298.

C. The Facial Language of Section 2252A(a)(3)(B) Captures Vast Amounts of Protected Speech.

Petitioner contends that "Section 2252A(a)(3)(B) could not ensnare promotions of Romeo and Juliet or mainstream movies such as *American Beauty* and *Traffic*." Pet. Br. 41. According to Petitioner, Congress observed that because "the producers of movies like *American Beauty* and *Traffic* do not intend for viewers to believe that real children are actually engaging in sexual activity . . . the movie producers [could not] satisfy the specific intent required by this provision." *Id.* (citing S. Rep. No. 2, 108th Cong., 1st Sess. 10, n.6 (2003)). There are two fundamental flaws with this position, each of which demonstrates the substantial overbreadth of Section 2252A(a)(3)(B).

1. Section 2252A(a)(3)(B) Applies to the Producers of Constitutionally-Protected Movies and Other Dramatic Works.

First, contrary to Petitioner's claims, many movie producers and other creators involved in the dramatic arts absolutely and intentionally seek to create the belief within their viewers that what is happening on the screen or stage is happening in reality. This is known as creating a "willing suspension of disbelief."[4] There is nothing surreptitious or

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[4] Samuel Taylor Coleridge is credited with originating this phrase *See* Samuel Taylor Coleridge, *Biographia Literaria* ch. xiv, (J. Shawcross ed., Clarendon Press 1907) (1817) (wherein Coleridge

devious about this method. Producers and other creators of dramatic productions are open about its use.[5] In fact, one local theater in Florida openly tells its audiences to bring a "*willing suspension of disbelief*" to the performances, informing them that "You and the actors have an agreement. They will create the imaginary world in which the drama takes place, and you agree to believe/accept the imaginary world that they create."[6]

For many, the willing suspension of disbelief is the central element of any successful dramatic production.[7] It is the essence of a good performance. It is the dynamic that causes movie viewers to cry when a cartoon deer is killed in *Bambi*, or to scream when a mechanical shark attacks an unsuspecting swimmer in *Jaws*, or to openly cheer when an oddly-shaped

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asks his readers to offer "that willing suspension of disbelief for the moment that constitutes poetic faith.").

[5] Andrew Tudor, *Monsters and Mad Scientists: A Cultural History of the Horror Movie* 121 (1989) (asserting that it is "commonplace to invoke 'willing suspension of disbelief' in discussing the nature of our involvement in fictional worlds . . . [w]e approach fictions already motivated to believe, prepared to be drawn into their worlds, wanting to be excited, moved, absorbed and captivated . . . .").

[6] Asolo Repertory Theatre, Sarasota, Florida. http://www.asolo.org /education/coming_to_theatre.asp, (last viewed August 2, 2007).

[7] *See* Charlotte Chandler, *It's Only a Movie: Alfred Hitchcock: A Personal Biography* 298 (2005) (identifying Hitchcock's credo in producing movies as "the willing suspension of disbelief" and discussing Hitchcock's claim that "although his pictures are very often high melodrama and border on the improbable, there was absolutely nothing in them that was illogical or dependent on pure chance.").

alien escapes to freedom in *E.T.* These audience reactions are effectuated through techniques that intentionally encourage viewers to adopt a temporary belief that what is portrayed on the screen or stage is happening in real life.[8] *See Williams*, 444 F.3d at 1302, n.80 (noting that "the whole aim of dramatic presentation is to make fictional happenings 'appear' to be real.").

For better or worse, the same dynamic of drama occurs within well-produced and constitutionally-protected depictions of youthful sexuality. In a multitude of movies, audience members are encouraged to suspend their common understanding that the depicted performers are just actors (regularly, adult performers), who are not really participating in sexual conduct, and asked to believe that these youthful characters actually *are* engaged in sexual activity. Whether in *American Beauty*, where a middle-age man is depicted as participating in sexual foreplay with a teenager, or in *Titanic*, where two underage lovers are viewed as consummating their relationship in a car, or in *Traffic*, where a teenager is shown prostituting herself for drugs, viewers are made to believe, if only for a moment, that the depicted underage characters are participating in sexual conduct.

And so, contrary to Petitioner's claims, it is likely that many producers and creators of mainstream movies *are* captured by the facial language and criminal confines of Section 2252(a)(3)(B) because, ostensibly, these producers,

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[8] Jeremy Lopez, *Theatrical Convention and Audience Response in Early Modern Drama* 95 (2003) (asserting that the "willing suspension of disbelief" can more accurately be called "a willingness to think of the play as though it were not a representation, as though it, like 'real life,' did not have a carefully constructed beginning, middle, and end . . . .").

consistent with the core mission of any movie production, intend for their viewers to believe that what is happening on the screen, including depictions of underage sexuality, is happening in reality.

More important, the creation of belief in dramatic audiences – regardless of the genre – is precisely what the First Amendment protects. *See Ferber*, 458 U.S. at 763 (making it clear that, to the extent a sexual message is important for literary, scientific, educational or artistic purposes, it can be delivered by using young-looking adults or some other form of "simulation" in the visual depiction). Plainly, the core of expressive freedoms protected by First Amendment includes the freedom of art to imitate real life. Because Section 2252A(a)(3)(B) criminally sanctions and disrupts this artistic endeavor, it is substantially overbroad.

2. Section 2252A(a)(3)(B) Muzzles More Speakers Than Just Movie Producers.

The second problem with Petitioner's claim that Section 2252A(a)(3)(B) does not ensnare the producers of mainstream movies is that producers are not the only individuals who offer advertisements, promotions, and presentations of dramatic material. Countless film critics, movie reviewers, and other persons interested in commenting on or selling dramatic art regularly transmit advertising, promotions, and presentations – both positive and negative – of material that they themselves did not produce. In many of these critical, expressive, and fully-constitutional outlets, the speakers are knowingly expressing themselves in a manner that reflects the belief and/or that causes others to believe that the dramatic work being reviewed is or contains youths engaged in sexual activity.

These forms of expression by non-producers are far from "hypothetical," "unrealistic," or "imagined." Pet. Br. 40, 42. As evidenced by the following movies and their associated reviews and advertisements, there are large quantities of constitutionally-protected materials, offered via the Internet or otherwise disseminated through interstate commerce, that are captured directly by the facial language of Section 2252A(a)(3)(B).

American Beauty (1999). The *Chicago Reader* presented a review of this Academy Award winning film wherein the reviewer expressed the belief that the film was either "a brilliant satirical diagnosis of what's most screwed up about life in this country . . . [o]r . . . a hypocritical piece of kiddie porn, brilliantly exploiting an audience's sexual frustration and turning it into coin."[9] Another movie review, entitled "An American Obscenity: A Review of the Oscar-Winning *American Beauty*," stated that movie "is about a man in middle age crisis who become infatuated with a teenage girl."[10]

Y Tu Mama Tambien (2002). Amazon.com advertises this film, which received the Golden Globe and New York Film Critics Circle Awards for Best Foreign Language Film, as a "three-way odyssey of two 17-year-old Mexican boys . . . and a 28-year-old Spanish beauty" that has "enough male and

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[9] http://www.chicagoreader.com/movies/archives/1999/0999/09249.html (last visited August 8, 2007).

[10] http://www.libertarian.co.uk/lapubs/cultn/cultn046.pdf (last visited August 8, 2007).

female nudity to qualify as softcore porn."[11] Christian Spotlight on Entertainment presents the movie as "the story of the dissolution of a friendship between two seventeen year old boys. . . . There is graphic sex, abundant nudity, casual adultery, masturbation and homosexuality. . . [It] looks like a modern day Gomorrah . . . ."[12] And Victoria Alexander of FilmsinReview.com comments that the film "starts right off with sloppy, messy, non-structured sex scenes involving 17-year-old[s] [Tenoch and Julio]." The review states that "As 17 year-olds, their entire day consists of talking about sex and masturbating. Be prepared for lots of blunt talk, realistic sex scenes, and body fluids floating in country club pools. This is real people sex with bad lighting and no choreography."[13]

Lolita (1998). Christian Spotlight on Entertainment paints this movie as "sickening and disturbing," and asserts that "[t]he theme of the movie speaks for itself." The review goes on to say, "With all the discussion today about child pornography and pedophiles this movie is a perfect example of that."[14] The U.S. Conference of Catholic Bishops Office for Film and Broadcasting ("Conference of Catholic Bishops") states that the movie is a "[g]lossy but empty

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[11] http://www.amazon.com/Mama-Tambien-Ana-L%C3%B3pez-Mercado/dp/B00005JL57 (last visited August 8, 2007).

[12] http://www.christiananswers.net/spotlight/movies/2002/ytumamatambien.html (last visited August 8, 2007).

[13] http://www.rottentomatoes.com/click/movie-1110860/reviews.php?critic=columns&sortby=default&page=1&rid=301820 (last visited August 8, 2007).

[14] http://www.christiananswers.net/spotlight/movies/pre2000/rvu-lolita.html (last visited August 8, 2007).

version of Vladimir Nabokov's novel about a middle-aged man . . . whose sexual obsession with a 12-year-old girl . . . ends tragically. [The director's] titlillating treatment of the pair's cross-country sexual odyssey lacks any sense of a larger human context other than that of a troubled pedophile. Gory violence, frontal nudity, explicit sexual situations . . . ."[15]

Mysterious Skin (2005). The Conference of Catholic Bishops refers to this movie as "Powerful, at times graphic, story of how being sexually abused as youngsters altered the lives of two teenagers . . . the sexual content is so raw, that many will find the film repellant and difficult to sit through. Rough and crude language, rear nudity, sordid sexual situations including violent rape, prostitution and drug use."[16]

Thirteen (2003). The Conference of Catholic Bishops presents this film as an "[u]nflinching drama about a clean-scrubbed seventh-grader . . . who is led astray by her charismatic but out-of-control classmate . . . its raw unfiltered depictions of self-destructive behavior, including drugs and casual sex, are at times difficult to watch . . . Several sexual encounters . . . ."[17] Amazon.com includes a product description stating, "'Brace yourself' (Rolling Stone) for a raw, revealing insight into urban adolescence that's so intense and realistic . . . thirteen-year-old Tracy . . . goes to shocking

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[15] http://www.usccb.org/movies/l/lolita1998.shtml (last visited August 8, 2007).

[16] http://www.usccb.org/movies/m/mysteriousskin.shtml. (last visited August 8, 2007).

[17] http://www.usccb.org/movies/t/thirteen2003.shtml (last visited August 8, 2007).

lengths in order to befriend . . . the most popular girl in school . . . leaving Tracy's desperate mom . . . powerless to rescue her from a whirlwind of drugs, sex and crime."[18]

American Pie (1999). Amazon.com advertises this movie with an editorial review stating that this film about teenagers "highlights intercourse with fruit pies, premature ejaculation broadcasted across the Internet, and the gratuitous 'gross-out' shots . . ."[19]

Kids (1995). The Conference of Catholic Bishops presents this film as "A day in the so-called life of a group of feral inner-city youths shows them to be aimless dropouts from home, school and the human race as they pass the time in pursuit of sex . . . [the Director] uses a lot of hand-held camera shots in filming a cast of adolescent non-actors in New York locations . . . Exploitative treatment of sex, violence, substance abuse and rough language."[20] And barnesandnoble.com offers this synopsis: "*Kids* offers a bleak, unblinking view of a group of vacuous, thoughtless New York City teens in their ceaseless quest for sex, drugs, and trouble . . . [T] he scene is set for disaster as the group

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[18] http://www.amazon.com/Thirteen-Holly-Hunter/dp/B00013RC2K (last visited August 8, 2007).

[19] http://www.amazon.com/American-Pie-Unrated-Widescreen-Collectors/dp/B000031WD9 (last visited August 8, 2007).

[20] http://www.usccb.org/movies/k/kids1995.shtml (last visited August 8, 2007).

heads back to a vacant apartment for an evening of sex, booze, drugs, and debauchery."[21]

Fast Times at Ridgemont High (1982). The Conference of Catholic Bishops presents this movie as an "examination of teen mores in the suburban jungle of shopping malls, discos and the playing fields of Southern California . . . Some extremely graphic nudity and a scene of adolescents discussing oral sex."[22]

Porky's (1982). The Conference of Catholic Bishops presents this movie as "Sex-obsessed adolescents cavort at a Florida high school . . . Witlessly vulgar movie with much nudity, graphic sexuality and an almost non-stop flow of verbal obscenities."[23]

The Tin Drum (1979). The Conference of Catholic Bishops describes this Academy Award-winning movie as a "German adaptation of Gunter Grass' satiric novel about a boy (David Bennent) who, in protest against the absurd world of adults, decides to stop growing on his third birthday . . . Crudely graphic treatment of sex, especially in scenes with the 13-year-old Bennent.[24] In other presentations, individuals

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[21] http://video.barnesandnoble.com/search/product.asp?z=y&EAAN=031398751823&itm=1 (last visited August 8, 2007).

[22] http://www.usccb.org/movies/f/fasttimesatridgemounthigh1982.shtml (last visited August 8, 2007).

[23] http://www.usccb.org/movies/p/porkys1982.shtml (last visited August 8, 2007).

[24] http://www.usccb.org/movies/t/tindrumthe1980.shtml (last visited August 8, 2007).

and public officials also expressed their belief that this movie was obscene, child pornography, or both.[25]

Pretty Baby (1978). The Conference of Catholic Bishops describes this movie as "The story of a 12-year-old girl (Brooke Shields), born and raised in a house of prostitution . . . [The director's] listless, dubiously nostalgic tour of a bordello relies on extravagant nudity and the flagrant exploitation of a 12-year-old girl."[26]

Reading each of these reviews, a reasonable person could conclude that mainstream, constitutionally-protected, and in some cases, award-winning, movies are knowingly being advertised, promoted, presented, and/or distributed, via interstate commerce, in a manner that reflects the belief or that causes another to believe that the material contains actual child pornography or, in some cases, obscene child pornography. In short, the facial language of Section 2252A(a)(3)(B) captures the content of each of these reviews, and in so doing, silences even the most literary, artistic, religious-based, or critical advertisements, promotions, or presentations of material discussing children and sexuality. Such extraordinary censorship is patently unconstitutional.

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[25] *See* Charles Oliver, "The Tin Drum Meets the Tin Badge: How a classic 1979 film suddenly turned into child porn," *Reason Magazine*, October 1997 at 50-51.

[26] http://www.usccb.org/movies/p/prettybaby1978.shtml (last visited August 8, 2007).

D. Section 2252A(a)(3)(B)'s Broad Sweep of Constitutionally-Protected Expression Is Not Justified By The Legislative Findings.

Petitioner attempts to justify the enormous scope of Section 2252A(a)(3)(B) by pointing to the legislative findings underlying the law, which suggest that the provision is needed to "dry up the market" for real child pornography and to assist prosecutors in securing convictions in child pornography cases. Pet. Br. 6, 31. These claims are far from compelling.

1. There Is No Causal Link Between Section 2252A(a)(B)(3)'s Ban on Protected Speech and Drying Up the Market for Child Pornography.

Petitioner claims that Section 2252A(a)(3)(B) is necessary because "even fraudulent offers to buy or sell unprotected child pornography help to sustain the illegal market for this material." Pet. Br. 31 (quoting H.R. Conf. Rep. No. 108-66, at 62 (2003)). There are several deficiencies with this attempted justification.

First, the legislative findings contradict the clear and repeated mandate of this Court that "Government may not suppress lawful speech as the means to suppress unlawful speech." *Free Speech Coalition*, 535 U.S. at 255. Second, the congressional findings fail to establish how certain presentations of material, which may not actually be child pornography or may not even be actual material ("purported material") will dry up the market for real child pornography. There is simply a lack of evidence and logical nexus to explain how barring protected speech will lead to a "drying of the market" for real child pornography. *See Williams*, 444 F.3d. at 1303 (concluding that "Congress has not adequately

explained why the mere [advertising, presentation, or promotion] of otherwise legal material should be prohibited in the pursuit of this interest."). And third, even if Congress had evidence to support its market theory of stopping "fraudulent offers to buy or sell unprotected child pornography," Section 2252A(a)(3)(B) goes well beyond facilitating this intended interest. The facial terms of the law are not limited to actual child pornography but are extended to other materials or even non-materials (purported items) that are not, in fact, real child pornography. Moreover, Section 2252A(a)(3)(B) is not limited to fraudulent sales or purchases. Persons with no intent of duping others into buying or selling real child pornography can nonetheless be prosecuted if they knowingly present material in a manner that reflects their belief about the content of the material.

As a result, in addition to being unsubstantiated by factual evidence, Petitioner's claimed "market theory" does not match up with the facial language of the statute.

2. Federal Authorities Have Had Little Trouble Securing Child Pornography Convictions.

As it did in *Free Speech Coalition*, Petitioner again claims that federal prosecutors have struggled to secure convictions in child pornography cases because it is difficult for them to meet their evidentiary burden of showing that the person depicted in sexually-explicit materials is an actual child. Pet. Br. 6. With all due respect, this claim is grossly exaggerated.

First, it should be noted that, even before Section 2252A(a)(3)(B)'s enactment, there were only a few defendants acquitted in child pornography cases. Of the 2091 child pornography cases initiated by the government between 1992 and 2000, only 10 defendants, regardless of what defense

strategy they employed, were acquitted. *See* Dept. of Justice, Executive Office for United States Attorneys, *Review of Child Pornography and Obscenity Crimes*, Report No. I-2001-07, Table 3, "Child Pornography Conviction Statistics." This amounts to a remarkably-low acquittal rate of only 0.4%. Even more telling is that none of these acquittals are reported as being based on the so-called "virtual child" defense. *Id.* In addition, both prior to and after the PROTECT Act's passage, federal prosecutions of child pornography have increased substantially. As the Eleventh Circuit recognized, "[t]otal federal prosecutions of child pornography cases increased more than 452% from 1997 to 2004." *Williams*, 444 F.3d at 1290 n.3 (citing Statement of Laura H. Parsky, Deputy Asst. Attorney General before Senate Comm. on Commerce, Science, and Transportation, January 19, 2006).

The legislative findings supporting Section 2252A(a)(3)(B) include the claim that criminal defendants in child pornography cases have raised the "virtual child" defense in nearly every case following the Supreme Court's decision in *Free Speech Coalition*. *See* PROTECT Act, Pub. L. No. 108-21, § 103, 117 Stat. at 677-78, Finding 10 (2003). The findings further claim that "[s]ome of these defense efforts have already been successful." *Id.* But Congress cites no specific cases in support of this conclusion. *Id.* In fact, the legislative findings supporting Section 2252A(a)(3)(B) do not offer a single child pornography case where a jury accepted a defendant's virtual-child defense.

During hearings held on what ultimately became the PROTECT Act, Congress was supplied with three post-*Free Speech Coalition* cases, with the claim that the virtual-child defense asserted in these cases resulted in "several adverse judgments" for the government. *See Child Abduction Prevention Act and the Child Obscenity and Pornography*

Prevention Act of 2003: Hearing on H.R. 1104 and H.R. 1161 Before House Subcomm. on Crime, Terrorism, and Homeland Security, 108th Cong. 22-24 (2003) (statement of Daniel P. Collins, Associate Deputy Attorney General) ("Collins statement"). But a closer examination of these cases, as they were presented to Congress, reveals that the virtual-child defense was not as successful for the defendants as the government claims.

In the first case, *United States v. Sims*, 220 F.Supp.2d 1222 (D.N.M. 2002), the defendant was originally convicted by a jury of four counts of offenses relating to the sexual exploitation of minors. During trial, the government argued that it was not required to prove that the visual depiction at issue in the fourth count of the indictment was that of a real minor, and the trial court agreed. *Id.* at 1224. As a result, the government did not present *any* evidence at trial that any of the charged images involved the use of actual children engaged in sexually-explicit conduct. *Id.* at 1227. Later, after the decision in *Free Speech Coalition* was announced, the trial court granted the defendant's motion for judgment of acquittal as to the fourth count, ruling that the government had the burden of proving that an actual child was depicted. *Id.* at 1228-29. The trial court, however, noted that "the government could have taken a more cautionary approach and presented evidence to prove the use of actual children, but it made the strategic decision not to do so." *Id.* at 1227. Thus, *Sims* does not support the legislative finding that the virtual-child defense has been "successful." The jury in *Sims* did not buy the defendant's arguments, even in the absence of governmental proof to the contrary.

Congress was also presented with *United States v. Bunnell*, 2002 WL 927765 (D.Me. May 1, 2002), with the claim that the district court in that case granted the

defendant's motion to withdraw his guilty plea to child pornography charges after *Free Speech Coalition* was decided. *See* Collins statement, *supra*, p. 22. This case, however, does not illustrate the success of the virtual-child defense. First, the defendant in *Bunnell* never went to trial, and thus, the virtual-child defense was never presented, successfully or otherwise, to a jury. *See* Criminal Docket for United States District Court, District of Maine, Case No. 1:02-CR-13-GZA-ALL. In addition, although the defendant filed a pretrial motion to dismiss the indictment based, in part, on constitutional arguments raised in *Free Speech Coalition*, this motion was denied by the district court. *See Bunnell*, 2002 WL 927765 at *5. Thus, in the end, the virtual-child defense did not result in an adverse judgment against the government.

Finally, Congress was given *United States v. Reilly*, 2002 WL 31307170 (S.D.N.Y. Oct. 15, 2002), as evidence that a defendant was permitted to withdraw his guilty plea after the *Free Speech Coalition* decision. *See* Collins statement, *supra*, p. 22. While the district court in that case did permit Reilly to withdraw his guilty plea following *Free Speech Coalition*, the court's ruling did not rely on any asserted virtual-child defense. *See Reilly*, 2002 WL 31307170 (S.D.N.Y). Rather, the court found that Reilly's plea allocution was deficient because it was based on the defendant's "mistaken premise" that the government could prove its case without proving that Reilly had knowledge that the charged material depicted actual children. *Id.* at *2. At the time Congress passed the PROTECT Act, Reilly had not been acquitted and the virtual-child defense had not been successfully presented to a jury. *See* Criminal Docket for United States District Court, Southern District of New York, Case No. 01CR-1114-RPP.

In the end, the legislative findings behind Section 2252A(a)(3)(B) suffer from the same infirmities as those constructed in the failed effort to justify the "conveys the impression" provision stricken in *Free Speech Coalition*. The reality is that, in terms of the substance of the legislative findings, nothing much has changed since the Court's decision in *Free Speech Coalition*. The fact of the matter is that federal authorities have had remarkable success in prosecuting child pornography cases before, during, and after *Free Speech Coalition*. Consequently, any legislative claims of difficulty in securing convictions in child pornography cases due to the availability of the "virtual child" defense are not only far from compelling, they are also a good distance from reality.

II. SECTION 2252A(a)(3)(B) IS UNCONSTITUTIONALLY VAGUE.

Under the void-for-vagueness doctrine, laws can violate the Due Process Clause of the Fifth Amendment in two ways: (1) when they do not give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, thereby failing to provide fair warning to those who wish to act lawfully, and (2) when they impermissibly delegate fundamental questions of policy to police officers, judges, and juries, thereby allowing for resolution of those questions on "an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). Section 2252A(a)(3)(B) violates the Due Process Clause in each of these ways.

First, Section 2252A(a)(3)(B) fails to define basic terms and phrases necessary to give persons of ordinary intelligence a basic understanding of what is prohibited. The statute fails to define its highly subjective, yet key, phrases "reflects the

belief" and "causes another to believe." Consequently, persons are left wondering: "What is a belief?" "Must a belief be genuine?" "What words or ideas reflect a belief?" "If the words 'teen,' 'high school,' or 'young' are used to describe images, does that automatically reflect the belief that a minor is depicted, as opposed to an eighteen or nineteen-year-old?" "What if the speaker is conveying a third party's belief about material?" "What's the difference between a belief and an opinion?" and "What if the belief caused in another person is an unreasonable one?" Without any clear answers to these questions, law-abiding citizens attempting to conform their conduct to the law cannot know for certain what these phrases actually mean. This is particularly problematic given that beliefs are regarded by some as being products of the imagination. *See* Gloria Gannaway, *Transforming Mind: A Critical Cognitive Activity* 99 (1994) (discussing the psychological theory that beliefs are "more like fantasies, products of the imagination, than like correlaries of experience.").

Second, Section 2252A(a)(3)(B)'s failure to provide definitions to these two key phrases gives law enforcement officials unbridled discretion in enforcing Section 2252A(a)(3)(B). The undefined phrases of this provision permit law enforcement officials to make completely subjective judgments about whether speech conveys the belief or causes a particular belief regarding the substance of a work or purported work. Given that a United States Senator has defined "safe-sex" educational materials as obscene,[27] a federal court has classified some visual depictions of fully

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[27] Former Senator Jesse Helms (R-NC) asserted that written educational materials promoting "safe sex" were "obscene." 133 Cong. Rec. S14203 (daily ed. Oct. 14, 1987).

clothed persons as "sexually explicit,"[28] and numerous movie reviewers have described award-winning and mainstream movies as child pornographic and/or obscene, *see supra* section I.C.2, one can only imagine the types of material that law enforcement officials will find criminal under the amorphous phrases "reflects the belief" and "causes another to believe."

Indeed, the entire prospect of allowing law enforcement officials to punish people based on their beliefs is a highly dubious enterprise, more reflective of an effort to gain totalitarian control over individuals than to maintain an open and free society. *See United States v. Ballard*, 322 U.S. 78, 86 (1944) (the freedom of belief, like the freedom of thought, "is basic in a society of free [people] . . . [Individuals] may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs."); *Free Speech Coalition*, 535 U.S. at 253 ("the right to think is the beginning of freedom"); *Cantwell v. Connecticut*, 310 U.S. 296, 303-304 (1940) ("the freedom to believe . . . is absolute."); *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) ("Our whole constitutional heritage rebels at the thought of giving government the power to control [people's] minds.").

Plainly stated, Section 2252A(a)(3)(B)'s ill-defined attack on beliefs and expression creates a "risk of discriminatory enforcement," which, when coupled with the severity of the criminal sanctions threatened by the Act, "raises special First

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[28] *See United States v. Knox*, 32 F.3d 733, 749 (3d Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995), where the court opined that the phrase "lascivious exhibition of the genitals or pubic area" does not require full or partial nudity, but can also apply to clothed persons as well.

Amendment concerns." *Reno v. ACLU*, 521 U.S. 844, 872 (1997) (finding that regulations of speech that threaten criminal sanctions, "when coupled with the 'risk of discriminatory enforcement' of vague regulations, poses greater First Amendment concerns than those implicated by . . . civil regulation[s]").

CONCLUSION

In attempting to address the true evils of child pornography, Congress must remain committed to the fundamental rights of all individuals under the First Amendment and resist attacking protected forms of *expression* in order to punish illegal forms of *conduct*. In short, Congress must not "burn the house to roast the pig." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). Section 2252A(a)(3)(B) fails to comply with this basic First Amendment requirement, and thus, is unconstitutional. Accordingly, the Eleventh Circuit's judgment should be affirmed.

Respectfully submitted,

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